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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-2213

WEST GULF MARITIME ASSOCIATION,
Petitioner

versus

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,
Respondents

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS, et al.,
Intervenors

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF INTERVENORS PORT OF HOUSTON AUTHORITY, et al., IN OPPOSITION

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Port of Houston Authority of Harris County, Texas, the City of Galveston [Galveston Wharves], Port of Beaumont Navigation District of Jefferson County, Nueces County Navigation District #1 [Port of Corpus

Christi], Brownsville Navigation District, Port of Port Arthur Navigation District of Jefferson County and Orange County Navigation District and Port Administration, [hereinafter referred to collectively as Intervenors] urge that the Petition for Writ of Certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit filed in the above cause be denied. All references to appendices contained herein are to the Appendix to the Petition, pages 1 through 114.

OPINIONS BELOW

Intervenors accept Petitioner's description of the Opinions Below.

JURISDICTION

Intervenors do not contest the jurisdiction of this Court as invoked by the Petition for Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

Intervenors are all public entities, governmental agencies and political subdivisions of the State of Texas which own and operate public port facilities at various locations within that State. As operators of public terminals, Intervenors must offer services and facilities to all for the same charges and on the same conditions and pursuant to publicly published tariffs, the provisions of which may not be varied from user to user.

Petitioner instituted a complaint proceeding before the Federal Maritime Commission seeking to have certain specified provisions of Intervenors' tariffs declared unjust, unreasonable, discriminatory and unlawful as violative of sections 15 and 17 of the Shipping Act of 1916 (46

U.S.C. 801, et seq.). In essence, the provisions complained of here are those that recognize vessel agents to be "users" of port facilities and as such, to be responsible for the payment of port charges reasonably related to the vessel interests they represent. Contrary to its statement at page 4 of the Petition, Petiioners' complaint was filed on behalf of all its members, i.e., steamship agents, the owners of some of those vessels, and stevedoring firms whose employees load and unload those vessels (App. p. 27), not as there reflected, only on behalf of its steamship agent members.

After a hearing which consumed 13 days and resulted in the development of 1962 pages of transcript and the introduction of 65 numbered exhibits (App. p. 29), the Administrative Law Judge filed an exhaustive opinion (App. pp. 24-90) upholding the contested tariff provisions in all respects save one. The single provision which was declared unlawful involved the declaration by some ports that they reserved to themselves the right to be the sole interpreters of the provisions of their own tariffs. Pursuant to the Order of the Administrative Law Judge (App. p. 90) the offending provisions of Intervenors' tariffs were deleted and are not at issue here. Of those upheld below, Petitioner here complains only of those related provisions of Intervenors' tariff which make wharfage charges the responsibility of vessel interests and require vessel agents, as users of port facilities, to be held accountable for payment thereof. In essence, Petitioner seeks once again to litigate the very issue previously determined in *West Gulf Maritime Association v. F.M.C. and U.S.A.*, 610 F.2d 1001 (C.A.-D.C. 1979), cert. denied, 101 S.Ct. 81, ____U.S.____ (1980). That Petitioner has been unable to demonstrate any valid reason

why that prior decision is not dispositive of this matter is revealed in the opinion of the Administrative Law Judge (App. p. 73), in the decision of the Federal Maritime Commission (App. p. 19) and in the decision of the United States Court of Appeals for the District of Columbia Circuit (App. p. 113). In that case this same Petitioner contested, *inter alia,* the following language found in the Port of Houston Authority's tariff:

> "3. Terminal Charges, set forth in Item No. 59, and Wharfage Charges, set forth in Item No. 65, are liabilities of the owners of the cargo; however, the collection and payment of same to the Port Authority *must be guaranteed by* the vessel, her owners and *agents, and the use of* Port Authority *facilities by the* vessel, her owners and *agents, shall be deemed an acceptance* and acknowledgment of this guarantee." (emphasis added)

It was urged that such provisions were unlawful because in conflict with Texas Law. There, as here, the Federal Maritime Commission determined that tenets of state and common law are not alone dispositive of Shipping Act issues absent a showing that such principles directly apply to Shipping Act considerations (App. pp. 76 and 19). Stated another way, whether or not a tariff provision might be determined unlawful as contrary to state law, were it to be tested in state court and so found, it would not necessarily follow that such provision would be unjust and unreasonable and therefore unlawful within the meaning of Section 17 of the Shipping Act unless the particular principles of state law had direct application to Shipping Act considerations.

The Question Presented at page I of the Petition is therefore misleading in the extreme as it wrongfully as-

sumes that the tariff provisions in issue are contrary to state law, since the findings below were to the contrary, and further assumes that unspecified principles of state law have direct application to Shipping Act considerations. Further, the Question Presented ignores the fact that, as noted by the Court of Appeals, the Commission did consider Texas law, but concluded that the subject provisions were not contrary thereto and specifically agreed with that conclusion (App. p. 114).

QUESTION PRESENTED

Thus the sole question presented is: Whether the Federal Maritime Commission, the body having primary responsibility for the administration and enforcement of the Shipping Act of 1916 (46 U.S.C. 801, et seq.) correctly found the provisions of Intervenors' tariffs to be just and reasonable regulations and practices within the terms of Section 17 of that Act (46 U.S.C. 816)?

STATUTES AND REGULATIONS INVOLVED

The statement of Statutory Provisions Involved as set out in the Petition is incomplete. The Statement omits reference to the provisions of the Texas Water Code authorizing navigation districts such as Intervenors to build, own and operate facilities common to public ports, Section 60.101, and placing upon Intervenors the burden to fix charges sufficient to produce revenues to pay their expenses, Section 60.103 (App. p. 28).

REASONS FOR DENYING THE WRIT

A.

THE DECISIONS BELOW ARE CONSISTENT WITH EXISTING DECISIONS UNDER THE SHIPPING ACT OF 1916 AND WITH PRIOR DECISIONS OF THIS COURT AND PRESENT NO QUESTION OF SUBSTANTIAL IMPORTANCE

Intervenors respectfully suggest that Petitioner wholly fails to present any question of significant importance which would be in the public interest to have decided by the Court of last resort of the United States and wholly fails to demonstrate any special or important reasons for granting the writ as required by Supreme Court Rule 17. Petitioner does not allege conflicting Court of Appeals' decisions, does not demonstrate that the holding below is contrary to decisions of this Court, nor is it shown that State law is applicable or controlling. Petitioner contended below that certain provisions of Intervenors' tariffs were unlawful pursuant to Texas State law and hence proscribed by Section 17 of the Shipping Act of 1916 (46 U.S.C. 816). After full consideration, the Federal Maritime Commission, the agency primarily responsible for administration of that Act, as well as the Court of Appeals for the District of Columbia Circuit, resolved that issue against Petitioner. The issue here presented is neither of sufficient importance nor sufficiently in the public interest, to warrant the time and attention of this Honorable Court. It is at best of interest only to the parties hereto, and the Petition should therefore be denied. *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 58 S.Ct. 860, 82 L.Ed. 1290 (1938); *Magnum Import Co. v. Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923).

B.

THE TARIFF PROVISIONS CHALLENGED HEREIN ARE NOT VIOLATIVE OF THE LAWS OF THE STATE OF TEXAS, THE COMMON LAWS, OR OF THE SHIPPING ACT OF 1916 (46 U.S.C. 801, et seq.).

Petitioner asserts that an agent is not liable upon the contracts of his disclosed principal under Texas law. In so doing Petitioner ignores the finding of the Administrative Law Judge below that normally agents do not inform the ports of the identity of the vessel interests when making berth arrangements and that as a result ports are generally unaware of such matters (App. p. 40). Petitioner also ignores the finding that agents sometimes act for undisclosed principals (App. p. 40). The Federal Maritime Commission having approved those findings (App. p. 18), the Court of Appeals having affirmed (App. p. 114), and Petitioner not having challenged the basis thereof in the substantial evidence, it cannot now contend that its agent members are agents for disclosed principals.

Petitioner's complaint that agents have not consented to be liable personally for the debts of their principals is equally flawed. The Administrative Law Judge held that any differences between the tariff provisions and practices placing liability for payment of vessel charges on vessel agents in *West Gulf Maritime Association v. FMC and United States of America,* supra, and the tariff provisions and practices placing liability for payment of vessel charges on vessel agents in the instant proceeding are neither substantive nor substantial (App. p. 75). He further held that the ports rely upon the agents' credit not the credit of the absentee vessel interests. The Federal Maritime Commission agreed and noted an earlier deci-

sion involving Petitioner to the same effect (App. p. 19). Petitioner did not challenge the substantial nature of the evidence supporting those findings and is thus not now privileged to ignore their effect.

Under Texas law consent to the terms of a unilaterally promulgated tariff is not necessary. Reference to the decisions in *City of Galveston v. Kerr Steamship Company*, 362 F.Supp. 289 (S.D. Tex., 1973); aff'd. per curiam 503 F.2d 1401 (C.A. 5, 1974) cert. denied, 420 U.S. 975 (1975) and *Rorie v. The City of Galveston*, 471 S.W.2d 789 (Tex. 1971) cert. denied, 405 U.S. 988, 92 S.Ct. 1250, 31 Law Ed. 2nd 454 (1972), both of which apply Texas Law, reveals that both cases affirmed the imposition of unilaterally promulgated tariff terms upon parties unwilling to accept the force of law behind those provisions.

In addititon to the fact that the record reflects the practices complained of herein by Petitioner have been followed for many years at the Intervenor ports, and that some of Petitioner's own witnesses testified as agents that such practices were not unjust, unreasonable or unfair (App. p. 35), the Federal Maritime Commission has previously considered similar provisions, and has found them not to be unlawful. *West Gulf Maritime Association v. F.M.C. and U.S.A.*, 610 F.2d 1001 (1979), cert. denied 101 S.Ct. 81, ____U.S.____ (1980). Shifting the responsibility for the collection and payment of charges such as those at issue does not constitute an unjust and unreasonable practice within the meaning of Section 17 of the Shipping Act of 1916. *Boston Shipping Association, Inc., et al. v. Port of Boston Marine Terminal Association and Massachusetts Port Authority*, 11 F.M.C. 1 (1965) and *Boston Shipping Association, Inc., et al v.*

Port of Boston Marine Terminal Association, et al., 10 F.M.C. 409 (1967).

Petitioner also misstates Texas law with regard to duress and business coercion. It has long been the law in Texas that duress

> ". . . cannot exist without there being a threat to do some act which the threatening party has no legal right to do—some illegal execution or some fraud or deception. The restraint must be imminent and such as to destroy free agency without present means of protection."

The foregoing is from the 1922 decision of the Texas Commission of Appeals in *Ward v. Scarborough*, 236 S.W. 434 (Tex. Com. App. 1922). Petitioner has not brought itself within the scope of that rule.

From the foregoing it can be seen that the tariff provisions in question do not run contrary to the laws of the State of Texas. Likewise they are not unjust or unreasonable regulations or practices under Section 17 of the Shipping Act of 1916 (46 U.S.C. 816). This latter contention was examined in depth both by the Administrative Law Judge and by the Federal Maritime Commission, and both decisions emphasized that the vessel agents in fact make arrangements for vessel berthing directly with the terminal operator, and in so doing becomes users of the facilities and incur the obligation to pay the tariff charges in question (App. p. 75 and 19).

A valid business need has been demonstrated for the tariff provisions in question. They have been held below to constitute just and reasonable regulations and to be fit and appropriate to the end in view. *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525

(1966); *Boston Shipping Association, Inc., et al. v. Port of Boston Marine Terminal Association and Massachusetts Port Authority,* 11 F.M.C. 1 (1965). The agents' consent to the terms of a tariff is not required under Texas law. *Rorie v. The City of Galveston,* 471 S.W.2d 789 (Tex. 1971) cert. denied, 405 U.S. 988, 92 S.Ct. 1250, 31 Law Ed. 2nd 454 (1972); *City of Galveston v. Kerr Steamship Company,* 362 F.Supp. 289 (S.D., Tex., 1973); aff'd per curiam 503 F.2d 1401 (C.A. 5, 1974) cert. denied, 420 U.S. 975 (1975). Holding agents responsible for the collection and payment of port charges incurred by the vessels they represent is not violative of the Shipping Act of 1916 (46 U.S.C. 801, et seq.). *West Gulf Maritime Association v. F.M.C. and U.S.A.,* 610 F.2d 1001 (C.A.-D.C. 1979) cert. denied 101 S.Ct. 81, ____U.S.____ (1980).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari previously filed herein should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that service of three copies of the Brief of Intervenors Port of Houston Authority, et al. in Opposition to the Petition for Writ of Certiorari has been made on each of the following named persons, by air mail, postage prepaid:

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Service of three copies of said document was also made on the following named person by United States Mail, postage prepaid:

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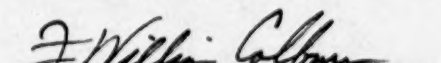

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